Supreme Court, U.S.
FILED

961624 APR 2 1997

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

PARSLEY DAIRY FARM,
A TEXAS GENERAL PARTNERSHIP,
AND ITS PARTNERS, JOE PARSLEY, MARTHA
PARSLEY, MICHAEL PARSLEY, JEFFREY
PARSLEY, AND JOANN PARSLEY,

Cross-Petitioners,

v.

CARGILL, INCORPORATED,

Cross-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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18 pp

QUESTION PRESENTED

Cargill, a member of a trade association, sold cottonseed and sent a sale confirmation to the Parsleys, who were not members of the trade association. Cargill's sale confirmation contained an arbitration clause that incorporated by reference the trade association's arbitration rules, which prohibited arbitration with a non-member without the non-member's consent. The Parsleys never consented to arbitration. Did the Fifth Circuit err in holding that an arbitration agreement existed between Cargill, the member, and the Parsleys, the non-members, under the trade association's rules?

LIST OF ALL PARTIES

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OPINIONS AND ORDERS BELOW

The United States District Court for the Eastern District of Texas denied Cargill's request for arbitration (see order reprinted in Cargill's appendix at 1-A). The United States Court of Appeals for the Fifth Circuit

affirmed the district court in an unpublished opinion (see opinion reprinted in Cargill's appendix at 2-A). The Fifth Circuit denied Cargill's petition for rehearing (see order reprinted in Cargill's appendix at 9-A). The Parsleys did not file a petition for rehearing.

JURISDICTION

On November 8, 1996, the United States Court of Appeals for the Fifth Circuit issued its opinion. On December 16, 1996, the Fifth Circuit denied Cargill's petition for rehearing. On March 11, 1997, Cargill's petition for a writ of certiorari was docketed. The Parsleys rely on Supreme Court Rule 12.5 for filing this conditional cross-petition for a writ of certiorari. The Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTE INVOLVED

The Federal Arbitration Act ("FAA") governs this case and provides:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. §2. No other constitutional provision, treaty, ordinance, or regulation is involved.

STATEMENT OF THE CASE

This case arises under diversity jurisdiction. Martha Parsley needed whole cottonseed to feed to the cows at her family's dairy near Troup, Texas. Martha called a Cargill salesman in Minneapolis, Minnesota, asked about buying 500 tons of whole cottonseed, and reached an oral agreement on the price, quantity, dates of delivery, and quality of the whole cottonseed that Cargill agreed to sell and deliver to the Parsleys. Arbitration was never discussed, and the Parsleys never intended to submit any dispute with Cargill to arbitration. Cargill had already bought a supply of cottonseed from Armistead Gin Co., Inc. in Coushatta, Louisiana. Cargill had truckers haul the cottonseed from Coushatta, Louisiana and deliver it to the Parsleys' dairy near Troup, Texas (R 7-14, 188, 226-234).

After Cargill began deliveries of the cottonseed, Martha received and signed Cargill's "Sale Confirmation and Contract" (R 234). The Parsleys' cows ate some of Cargill's cottonseed, got sick, stopped milking, and started dying. The Texas Feed & Fertilizer Control Service investigated, ordered Cargill to recall the cottonseed, and ruled that Cargill was in major violation of the Texas Feed Act for selling adulterated feed (R 293-320, 365-391). Thereafter, the Parsleys sued Cargill and Armistead Gin Co., Inc.

The subject of this appeal is an arbitration clause in Cargill's "Sale Confirmation and Contract," a non-negotiated, pre-printed, one-page, adhesion document submitted unilaterally and after the fact by Cargill. Nothing on the front of Cargill's sale confirmation referred to arbitration. Paragraph 13 – under which Cargill claims a right to arbitration – was the barely readable, last para-

graph on the back of the document. Turn it over, squint, and you may be able to read Paragraph 13, which states:

> The parties both agree that the sole remedy for resolution of all disagreements or disputes between the parties arising under this contract shall be arbitration proceedings under NGFA Arbitration Rules (or under the Rules specified on the front of this contract, if different). The decision and award determined by such arbitration shall be final and binding upon both parties.

The front of the sale confirmation specified NCPA rules – i.e., the rules of a trade association, the National Cottonseed Products Association.

The district court denied Cargill's request for arbitration based on this clause. 1-A. The Fifth Circuit affirmed. It held that even though the Parsleys were not members of the NCPA, the Parsleys became NCPA "Rule 93 nonmembers 'agreeable' to arbitrate under NCPA Rules" and were "deemed to have agreed to take all steps reasonably required by the NCPA Rules, explicitly or implicitly, to faciliate arbitration." 6-A. The Parsleys contend this ruling is erroneous. However, the Fifth Circuit held that Cargill did not comply with the deadline under the NCPA rules for demanding arbitration and therefore cannot compel arbitration. Although the Fifth Circuit's analysis is incorrect, the Fifth Circuit's result of denying arbitration is correct. Accordingly, the Parsleys are satisfied with the Fifth Circuit's ultimate holding and request this Court to review the Fifth Circuit's determination that an arbitration agreement existed between the parties only if the Court considers Cargill's appeal.

ARGUMENT

I. GENERAL PRINCIPLES REGARDING THE CREATION OF AN ARBITRATION AGREEMENT.

The Federal Arbitration Act ("FAA") applies only if the parties have entered into a written arbitration agreement. 9 U.S.C. §2. This Court has held that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Technologies v. Communication Workers,* 475 U.S. 643, 648 (1985). The FAA "does not require a party to arbitrate when they have not agreed to do so . . . nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement." *Volt Information Sciences v. Board of Trustees,* 109 S.Ct. 1248, 1255 (1989). Generally, the "question of arbitrability" is for the court to decide. A court may not . . . in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes non-arbitration agreements under state law." *Perry v. Thomas,* 107 S.Ct. 2520, 2527, n.9 (1987). The FAA requires a court to construe an arbitration agreement according to its terms, just like any other private contract. *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 115 S.Ct. 1212, 1214 (1995). The Court clarified these principles in *First Options of Chicago, Inc. v. Kaplan,* 115 S.Ct. 1920 (1995). The starting point is "the fact that arbitration is simply a matter of contract between parties; it is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration." The Court held that in determining if the parties agreed to arbitrate a matter, including arbitrability, a court "should

apply ordinary state law principles that govern the formation of contracts . . .," except a court "should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so." Thus, there is a presumption that the court decides arbitrability if the agreement is silent or ambiguous on the point, which is the situation with Cargill's alleged arbitration agreement.

II. THE EXISTENCE OF AN ARBITRATION AGREEMENT TURNS ON WHETHER NCPA ARBITRATION RULES PROVIDED FOR ARBITRATION BETWEEN THE PARTIES.

According to the Fifth Circuit, even though NCPA arbitration did not extend to non-members of the NCPA like the Parsleys, they became subject to NCPA arbitration against their will by purchasing cottonseed from Cargill, an NCPA member, and by not objecting to Cargill's unilateral sale confirmation containing an arbitration clause that incorporated NCPA rules by reference. 6-A. The Fifth Circuit's interpretation and application of the NCPA rules is erroneous. The scope of Cargill's arbitration clause is no greater than the scope of NCPA arbitration, and no arbitration agreement existed because NCPA arbitration did not extend to non-members of the NCPA like the Parsleys. A review of the relevant rules of the NCPA demonstrates the Fifth Circuit's error in holding that an arbitration agreement existed between the parties.

Article V of the NCPA's Charter contains a mandatory provision for NCPA membership:

> [a]n applicant to become a Regular, Special or Associate Member of the Corporation, meeting the requirements for such membership above set forth, shall be admitted to membership upon the approval

> of the Secretary of the Corporation of a written application, in the form prescribed by the Board of Directors, signed by the applicant, and endorsed by the written recommendation of two Regular Members of the Corporation in good standing; provided that such approval by the Secretary shall be made subject to the approval or rejection of the Board of Directors.

NCPA Rule 1, entitled "Applicability of These Rules," states:

> Members may make contracts with non-members, subject to these Rules, for the purchase or sale of the commodities herein referred to. *Such contracts shall be subject to the limitation upon arbitration privileges set forth in Rule 93.*

Thus, Cargill, as a member, could make a contract subject to NCPA rules with the Parsleys, as non-members, for whole cottonseed, a commodity referred to in NCPA rules, but the contract "*shall* be subject to the limitation upon arbitration privileges set forth in Rule 93." This means that Rule 93 – entitled "Arbitration Between Members and Non-Members" – Limits the "arbitration privileges" otherwise provided under NCPA rules for disputes between NCPA members. Importantly, such a contract does not magically transform the non-member into a member of the NCPA, as the Fifth Circuit held. A non-member cannot become a member of the NCPA merely by entering into a contract with a member subject to NCPA rules. Instead, Rule 1 recognizes that the non-member will remain a non-member, and any arbitration in the contract is limited by Rule 93.

NCPA Rule 93 expressly provides that an NCPA member does *not* have the right to arbitration of a dispute

with a non-member unless the non-member consents to arbitration:

> *No non-member may demand an arbitration against a member of this Association.*
>
> *If a dispute arises between a member and a non-member, arbitration may be held if the member originates the request and the non-member is agreeable thereto.* In such cases, the non-member must either (a) apply for membership, accompanying such application by the prescribed membership and arbitration fees, or (b) deposit with the Association the regular arbitration fee plus a special fee equal to 25 percent of the cash amount involved in the dispute, but not in excess of $250.00.
>
> . . .
>
> *If* a dispute arises between a member and a non-member on a NCPA contract and *the member originates a demand for arbitration and the non-member is not agreeable thereto or does not respond to the demand to arbitrate,* the Secretary of the Association shall, within thirty (30) days of making the demand to arbitrate, notify all members of the Association that the non-member failed to agree to arbitrate a NCPA contract . . . .

(R 202).

A distinction exists between a predispute arbitration agreement and a post-dispute submission agreement. A predispute agreement submits future controversies to arbitration, whereas a post-dispute submission agreement submits only existing controversies to arbitration. 4 Am. Jur. 2d *Alternative Dispute Resolution,* §70 (1995); R. Rodman, *Commercial Arbitration with Forms,* §4.1 (1984). The NCPA rules recognize this important distinction.

On the one hand, a predispute arbitration agreement exists between NCPA members: Rule 80, entitled "Agreement to Arbitrate," states that "[e]ach member of this Association, applying for membership, has agreed to submit to arbitration any dispute with another member arising out of any contract for the purchase or sale of commodities covered by these Rules." This is a prospective agreement to arbitrate future disputes. Rule 80 also provides that "[a]ny member involved in a dispute may demand arbitration and, when such demand has been made, each disputant shall sign the standard form of agreement to arbitrate, as set forth in Rule 81." Thus, the act of applying for membership constitutes a predispute agreement to submit to arbitration "any dispute with another member," and upon demand for arbitration, obligates a member to enter into a post-dispute submission agreement (R 199). Likewise, Rule 91, involving deposits and costs, and Rule 92, involving notice of claims, indicate that the right to arbitrate exists only when all parties involved are members of the NCPA (R 201-202). The Parsleys have never applied for NCPA membership and therefore have never entered into a predispute agreement.

On the other hand, the NCPA rules exclude the possibility of a predispute arbitration agreement between a member and a non-member, and instead recognize only the possibility of a post-dispute submission agreement between a member and a non-member. As noted above, NCPA Rule 1 states a contract between a member and a non-member "shall be subject to the limitation upon arbitration privileges set forth in Rule 93." The Fifth Circuit overlooked two key facts about Rule 93. First, "[n]o non-member may demand an arbitration against a member of this Association." Why? Because Rule 93 expressly

negates the possibility of a predispute arbitration agreement between a member and a non-member. This is reflected in the second sentence: "*If a dispute arises* between a member and a non-member, arbitration may be held if the member originates the request and the non-member is agreeable thereto." The phrase "[i] f a dispute arises" is also used to begin the third paragraph of the rule. This significant phrase means the existence of a dispute is a condition precedent to the creation of an arbitration agreement between a member and a non-member – i.e., a post-dispute agreement. There was no dispute between Cargill and the Parsleys at the time Cargill sent its sale confirmation to the Parsleys; thus, this condition precedent to an arbitration agreement was not satisfied.

Second, Rule 93 expressly provides two alternatives "[i] f a dispute arises between a member and a non-member." The first alternative is that "arbitration *may* be held if . . . the non-member is agreeable thereto." The use of the non-mandatory term "may" establishes that after a dispute arises a member such as Cargill cannot compel arbitration against the wishes of non-members such as the Parsleys. The non-members must be agreeable to arbitration *after* "a dispute arises." If after a dispute arises the "non-member is agreeable" to the member's request for arbitration, the non-member must pay the regular arbitration fee and either apply for membership or pay a special fee.

Rule 93 recognizes a second alternative: the non-member may refuse the member's request for arbitration. The third paragraph of Rule 93 states: "[i] f a dispute arises between a member and a non-member on a NCPA contract and the member originates a demand for arbitration and the non-member is not agreeable thereto . . . ."

If the NCPA rules recognized a predispute arbitration agreement, then the non-member would not have the right to refuse a member's request for arbitration. Instead, a dispute must arise between a member and a non-member – and the non-member must agree to arbitrate that existing dispute – before an NCPA arbitration agreement can be created. When "a dispute arises," the non-member may elect to not agree to NCPA arbitration. The only consequence of the non-member's election not to arbitrate is that "the Secretary of the Association shall, within thirty (30) days of making the demand to arbitrate, notify all members of the Association that the non-member failed to agree to arbitrate a NCPA contract." Hence, the first paragraph of Rule 93 (which prohibits a non-member from compelling a member to arbitrate) is consistent with the second and third paragraphs (which prohibit a member from compelling a non-member to arbitrate against the non-member's wishes). After the dispute arose between Cargill and the Parsleys, the Parsleys filed this lawsuit, and never agreed to arbitrate any dispute with Cargill.

III. IN THE DISTRICT COURT CARGILL ADMITTED IT DID NOT HAVE AN ARBITRATION RIGHT UNDER NCPA RULES.

Cargill's arbitration clause extended only as far as NCPA arbitration extended, which unequivocally did not extend to arbitration of any dispute with the Parsleys, who were not members of the NCPA. Cargill itself confessed in a pleading in the district court that it did not have any right to arbitration with the Parsleys under the NCPA rules:

> [The Parsleys' response] discusses the NCPA rules, and the fact that the [Parsleys are] non-member[s]

> of the NCPA. As such, the NCPA rules cannot compel arbitration between a member and a non-member when the member is the one seeking to compel arbitration. *Doubtless, the point made by the [Parsleys] in their brief is a good one. [Cargill] is not taking the position that the NCPA rules would compel arbitration between a member and a non-member. Even a casual reading of the rules would indicate that is not the case. In effect, [Cargill] agrees with the conclusions of the [Parsleys] in this regard.* However, [Cargill] does not seek to compel arbitration pursuant to the NCPA rules, but rather pursuant to the contract entered into between the [Parsleys] and Cargill . . . .

(R 212). In this admission, Cargill conceded that it had no right to arbitrate with the Parsleys under the NCPA rules, which means Cargill had no right to arbitrate, period. The Fifth Circuit erred in ignoring Cargill's admission.

IV. THERE WAS NO ARBITRATION AGREEMENT BETWEEN CARGILL AND THE PARSLEYS.

Cargill's arbitration clause incorporated NCPA arbitration. Hence, Cargill's arbitration clause provided for whatever arbitration was required under the NCPA rules – no more and no less. Since NCPA arbitration did not extend to the Parsleys, there was no arbitration agreement between the parties. Other federal cases have held there was no arbitration agreement on virtually identical facts. *Tays v. Covenant Life Insurance Co.*, 964 F.2d 501 (5th Cir. 1992); *Nielsen v. Piper, Jaffray & Hopwood, Inc.*, 66 F.3d 145 (7th Cir. 1995); and *Prudential Securities, Inc. v. Emerson*, 905 F.Supp. 1038 (M.D. Fla. 1995). When faced with similar facts, a Texas court also

held there was no arbitration agreement. *Texas Private Employment Association v. Lyn-Jay International, Inc.*, 888 S.W.2d 529 (Tex. App. - Houston [1st Dist.] 1994, no writ).

CONCLUSION

Although the Parsleys disagree with the Fifth Circuit's determination that an arbitration agreement existed between the parties, the Parsleys are satisfied with the Fifth Circuit's ultimate holding that Cargill cannot compel the Parsleys to arbitrate their claims against Cargill. If this Court grants Cargill's petition for a writ of certiorari, the Parsleys request the Court to grant this conditional cross-petition and hold that there was no arbitration agreement between Cargill and the Parsleys.

Respectfully submitted,

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